Supreme Court, U.S.
FILED
OCT 13 1994
OFFICE OF THE CLERK

No. 94-371

# In the Supreme Court of the United States

OCTOBER TERM, 1994

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JOHN WILLIAM GOFF, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals erred in reviewing de novo the district court's determination that petitioner's family situation constituted an extraordinary circumstance warranting a downward departure from petitioner's sentencing range under the Sentencing Guidelines.

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. Ai-Axvii) is reported at 20 F.3d 918.

### JURISDICTION

The judgment of the court of appeals was entered on April 6, 1994. A petition for rehearing was denied on June 30, 1994. Pet. App. Ci. The petition for a writ of certiorari was filed on August 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C, 1254(1).

## STATEMENT

After entering a guilty plea in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of money laundering, in violation of 18 U.S.C. 1956(a). The district court departed downward from the Sentencing Guidelines range of 51 to 63 months' in prison, and sentenced petitioner to six months imprisonment with work release. The court of appeals reversed and remanded with instructions to resentence petitioner within the Guidelines range. Pet. App. Ai-Axii.

1. In late 1986 or early 1987, petitioner, a former business consultant, became associated with a successful narcotics dealer named Michael Salsman. In January 1992, that association resulted in petitioner's indictment on two counts of money laundering. 18 U.S.C. 1956(a)(1)(B)(i) and (ii). Count 1 of the indictment was based on petitioner's having advised Salsman to structure a $15,000 cash purchase of real estate so as to avoid the filing of a currency transaction report with the Internal Revenue Service. Count 2 related to approximately $73,000 in drug proceeds that had been deposited into the bank account of a corporation set up by petitioner as part of an alleged scheme to filter Salsman's drug proceeds into legitimate businesses. On the morning of trial, petitioner agreed to plead guilty to Count 1 of the indictment in exchange for a dismissal of Count 2 upon imposition of sentence. Pet. App. Aiv-Av; Gov't C.A. Br. 2, 4-5.

At petitioner's sentencing hearing, the district court determined that petitioner's offense was governed by Sentencing Guidelines § 2S1.1 and that his sentencing range was 51 to 63 months in prison. The court, however, believed that range to be "unduly harsh," and it

departed downward to sentence petitioner to six months' imprisonment with work release. Pet. App. Ai-Aii. The court based the departure on petitioner's age (68 at the time of sentencing), his lack of prior convictions, the "relatively minor" nature of his offense, and his family responsibilities to three young sons and a wife receiving Social Security benefits for depression and panic disorder. [1] *Id.* at Aii; Gov't C.A. Br. 13-14.

2. The government appealed petitioner's sentence. It argued that petitioner's prior record, his age, and the purportedly "minor" nature of his offense were not permissible grounds for departure at all, and that petitioner's family circumstances did not support departure from the Guidelines because his family circumstances were not sufficiently atypical. Gov't C.A. Br. 15. With respect to the latter point, the government noted evidence that petitioner had a net worth of more than $800,000 and was frequently absent from the family home in Arizona because he traveled to St. Louis to manage an apartment building owned by his wife. *Id.* at 1-2, 9-14, 28-31.

Reviewing de novo whether the factors cited by the district court were permissible grounds for departure, a divided panel of the court of appeals reversed and remanded the case with directions that petitioner be

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[1] In an effort to show that his family circumstances justified a departure, petitioner submitted four pieces of documentation: an unsigned two-and-one-half-year-old letter from a physician stating that Mrs. Goff was being treated for work stress; an excerpt from an unidentified document stating that Mrs. Goff was under treatment for depression and panic related to her job; Mrs. Goff's notice of award from the Social Security Administration; and a therapist's letter stating in conclusory fashion that petitioner's presence was necessary for his family's stability. Gov't C.A. Br. 9-12.

resentenced within the appropriate Guidelines range. Pet. App. Axii. The court of appeals found that each ground on which the sentencing court had relied was insufficient: (1) petitioner had not been found to be infirm, and the court of appeals had "consistently denied departures" based solely on age to others in petitioner's age group, *id.* at Ax-Axi; (2) the absence of any prior convictions provided no ground for departure, because petitioner's criminal history classification (Category I) was already "set for a first offender with the lowest risk of recidivism," *id.* at Aiv; (3) no downward adjustment was warranted based on the view that petitioner's offense was "minor," because, far from being "merely technically unlawful," petitioner's actions were knowing and fell squarely under the money laundering statute, *id.* at Avii; and (4) recognizing that "[a]ll families suffer when one of their members goes to prison," petitioner's "family responsibilities are simply not outside the heartland of cases that the Sentencing Commission has considered," *id.* at Aix-x.[2]

**ARGUMENT**

Petitioner argues (Pet. 9-20) that the court of appeals erred in applying a de novo standard of review to the district court's determination that his family situation constituted extraordinary circumstances warranting a downward departure.[3] Noting that other circuits apply a

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[2] The dissenting circuit judge disagreed with the majority with respect to its holding that family circumstances did not justify a departure in this case. Pet. App. Axii.

[3] As a general rule, a district court must impose a sentence within the applicable Guideline's range unless it finds mitigating circumstances that are of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines and determines that those circumstances

"clearly erroneous" or similarly deferential standard of review, he urges this Court to resolve the conflict. We believe the court of appeals was correct in reviewing de novo the district court's departure from the applicable Guidelines range. We recognize, however, that the First,[4] Fourth,[5] Seventh,[6] Ninth,[7] and Tenth[8] Circuits apply a more deferential standard of review.[9] Although the conflict may warrant review in an appropriate case, this case is not an appropriate vehicle for that review, since the application of a more deferential standard would not have altered the outcome for petitioner.

1. All courts of appeals review de novo whether the circumstances cited by the district court are of a kind

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should result in a different sentence. 18 U.S.C. 3553(b); Sentencing Guidelines § 5K2.0, Policy Statement. Where the Commission has fully considered a factor in establishing the Guidelines, that factor is not a valid ground for a departure. *United States* v. *Wesley*, 990 F.2d 360 (8th Cir. 1993).

[4] See *United States* v. *Rivera*, 994 F.2d 942, 950 (1st Cir. 1993).

[5] *United States* v. *Deigert*, 916 F.2d 916, 919 (4th Cir. 1990).

[6] *United States* v. *Carey*, 895 F.2d 318, 323 (7th Cir. 1990).

[7] *United States* v. *Martinez-Guerrero*, 987 F.2d 618, 620 (9th Cir. 1993).

[8] *United States* v. *Slater*, 971 F.2d 626 (10th Cir. 1992).

[9] As petitioner notes, the Sixth Circuit appears also to have adopted a de novo standard of review. See *United States* v. *Hays*, 899 F.2d 515, 519, cert. denied, 498 U.S. 958 (1990). Contrary to petitioner's interpretation, we do not read *United States* v. *Higgins*, 967 F.2d 841, 843 (3d Cir. 1992), to approve a deferential standard of review. In *Higgins*, the sentencing court had refused even to consider a downward departure based on the defendant's circumstances. The Third Circuit remanded the case, stating that the determination whether the circumstances were extraordinary was for the district court to make in the first instance. *Id.* at 846 n.2. The court of appeals did not hold that its review of the district court's determination would be deferential.

that may ever warrant departure from the Guidelines. Similarly, all apply the "clearly erroneous" standard to district court findings respecting the historical facts at issue. The only facet of the analysis on which the courts differ is in their review of a district court determination that the particular factual circumstances are sufficiently extraordinary to warrant departure; *i.e.*, when departure is theoretically permissible for a class of circumstances, whether the facts justify a reduction of the sentence.

According a high degree of deference to departures from the Guidelines is fundamentally inconsistent with the rationale underlying the federal sentencing scheme. Deferential review effectively frees each district court to apply its own sense of what is "usual" or "ordinary" in determining whether, in an individual case, a departure is warranted. The Sentencing Reform Act, however, was enacted "to eliminate the 'unwarranted disparit[ies] and . . . uncertainty' associated with indeterminate sentencing." *Burns* v. *United States*, 501 U.S. 129, 133 (1991) (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 49 (1983)). Giving each district court leeway to depart from Guidelines sentencing ranges in accordance with its own notion of what constitutes extraordinary circumstances would decrease uniformity in sentencing and promote the very uncertainty and inequity the Guidelines were meant to avoid.[10]

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[10] Petitioner argues (Pet. 18) that "the *de novo* standard of review is a totally unwarranted waste of appellate judicial resources." But regardless of the standard employed, where there is an appeal, a court of appeals still must review a sentencing court's determination as to whether circumstances permit a departure. Petitioner further argues (Pet. 19) that "the *de novo* review practitioners have lost sight of their ultimate goal—'reasonableness,'" and that, under 18 U.S.C. 3742(f)(2), a sentence

2. Even under a deferential standard of review, the district court's finding that petitioner's family circumstances were extraordinary could not survive scrutiny. Indeed, the author of the opinion in this case stated his belief that the panel would have reversed the district court even under a deferential standard of review. Pet. App. Aiii n.1. The record amply supports that conclusion.

The record in this case establishes only the truism that a family suffers when one of its members, particularly the head of the household, is incarcerated. The evidence demonstrated, at most, that Mrs. Goff is unable to care for the couple's children. But the Goffs have considerable assets, and there is nothing in the record to show that they could not use those assets to obtain whatever help they might need in caring for their children. The record also contains nothing to indicate that petitioner's unique presence is unusually important to the health or well-being of his children, beyond a conclusory statement that petitioner's presence is needed for the family's stability. In view of the Commission's intention that departures "be quite rare,"

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outside the applicable guideline range may be set aside only if it is unreasonable. Under 18 U.S.C. 3553(b), however, a downward departure is not allowed in the absence of mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission. Where, as here, the circumstances are within the heartland of the Guidelines and do not meet the requirements for a downward departure, any sentence below the sentencing range must be deemed unreasonable within the meaning of Section 3742(f)(2). See *Williams* v. *United States*, 112 S. Ct. 1112, 1120 n.2, 1121 (1992) (equating analysis of whether circumstances were adequately taken into consideration by the Guidelines with analysis of whether departure from the Guidelines range was reasonable).

*United States* v. *Tucker*, 986 F.2d 278, 280 (8th Cir.), cert. denied, 114 S. Ct. 76 (1993), petitioner's family circumstances would not be deemed sufficiently extraordinary to warrant a downward departure, regardless of the standard of review.

Petitioner asserts (Pet. 17-18) that on the facts of this case, other circuits would have affirmed the district court. He refers to several cases cited by the dissent (Pet. App. Axiv-Axv): *United States* v. *Sclamo*, 997 F.2d 970 (1st Cir. 1993); *United States* v. *Gaskill*, 991 F.2d 82 (3d Cir. 1993); *United States* v. *Johnson*, 964 F.2d 124 (2d Cir. 1992); and *United States* v. *Pena*, 930 F.2d 1486 (10th Cir. 1991). He contends that the dissent could have cited *United States* v. *Alba*, 933 F.2d 1117 (2d Cir. 1991), as well. Pet. 17 n.3.

In each of the cases on which petitioner relies, the reviewing court noted detailed, specific facts showing that the defendant's presence was necessary to the well-being of his or her family. *Sclamo*, 997 F.2d at 972-974 (defendant's foster son found to suffer from attention deficit hyperactivity disorder; detailed submission from psychiatrist who had extensive experience with defendant showed defendant's presence as role model was critical to his foster son's development and treatment); *Gaskill*, 991 F.2d at 83-84 (defendant's wife, who suffered from serious mental disorder and was suicidal, required constant care; record showed that there was no means of providing care other than by defendant); *Johnson*, 964 F.2d at 129 (defendant provided sole means of support for four children); *United States* v. *Alba*, 933 F.2d at 1122 (defendant was sole economic support for large family); *Pena*, 930 F.2d at 1494-1495 (defendant's criminal conduct was aberrational and defendant provided sole means of support for her two infant children).

The circumstances in this case are different. The record here shows that the Goffs have ample financial resources to secure any necessary care or other services, and petitioner made no specific showing to demonstrate the necessity of his presence. Given the critical differences between this case and those on which petitioner relies, there is no basis for concluding that another circuit would have reached a different decision from that here.

To the extent that the opinions cited by petitioner shed any light on how those courts would have decided this case, any difference in results would likely derive not from differences in the level of scrutiny, but instead from the panels' differing views of what constitutes an extraordinary family hardship. But differences among the circuits in their application of particular provisions of the Guidelines do not require this Court's intervention; they are, rather, best addressed by the Commission. See *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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